No. 83-185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SYLVIA COOPER, *et al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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On Petition for a Writ of Certiorari to the
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PETITIONER'S REPLY BRIEF

1. Respondents acknowledge that the court of appeals dismissed as a finding of "ultimate fact" the district court's conclusion that petitioners were the victims of intentional racial discrimination. They do not of course challenge the correctness of the decision in Pullman-Standard v. Swint, 456 U.S. 273 (1982) rejecting the purported

distinction between "ultimate" and "subsidiary" facts.

Respondents defend the decision of the court of appeals on the bold theory that the Fourth Circuit simply did not mean what it said. But while respondents both urge this Court to disregard the literal language of the panel opinion, they are unable to agree about what that opinion does mean. The Bank asserts that what the panel meant to say was that, because the finding of discrimination was contained in a document entitled "Memorandum of Decision", it was not really a "finding" within the meaning of Rule 52(a). (Bank Brief, 19). The United States rejects that interpretation, suggesting instead that what the panel meant was that the district finding involved a "mixed question of law and fact." (U.S. Brief, p. 8).

This Court has not heretofore upheld lower court opinions literally and expressly contrary to decisions of this Court based on

such speculation that an erroneous passage may have been a mere slip of the judicial pen. Meaningful appellate review would be impossible if the actual language of the opinions under review could be disregarded on the basis of this sort of conjectural exegesis. It is sufficient to require summary reversal that the Fourth Circuit opinion as written is inconsistent with Swint. If the court of appeals intended to say something other than what appeared in its opinion, it will have ample opportunity to make that clear on remand.

2. The United States candidly acknowledges the division among the circuits regarding the use of findings drafted by counsel. (U.S. Brief, pp. 5-7). The government suggests the "better appproach" in such situations is for the court of appeals "to remand the case for new findings by the district court", as in fact occurs in the First and Tenth Circuits. (U.S. Brief, p.7;

see also Petition, p. 18). The government notes that it is "not aware of any circumstances which would justify the failure of the court below to follow that practice here." (U.S. Brief, p. 7).

Although the court of appeals itself announced that it was applying a special standard of review in this case, alternatively phrased as "close scrutiny" and "careful scrutiny" (Petition, 23a), respondents insist that the decision below actually applied the ordinary "not clearly erroneous" standard. (Bank Brief, pp. 11, 12, 15; United States Brief, p. 5). The United States takes the position that the court of appeals applied the correct standard, yet somehow reached the wrong result, insisting that "the record fully supports the district court's factual findings." (U.S. Brief, p. 4). But while the United States contends that affirmance is required by the not clearly erroneous rule, the Bank maintains that the same rule requir-

ed reversal of the "erroneous, unsupported and often baseless findings adopted by the District Court." (Bank Brief, p. 17).

In Pullman-Standard v. Swint, 456 U.S. 273 (1982), as here, the court of appeals articulated two different standards of review. Respondent in that case urged the Court to assume or conclude that the correct standard had in fact been applied, but this Court declined to do so. 456 U.S. at 290-93. This case illustrates the correctness of, and is controlled by, Swint. If mere mention of the Rule 52 standard were sufficient to give rise to a conclusive presumption that the not clearly erroneous rule had been applied, enforcement of Rule 52 by this Court would be impossible, and "not clearly erroneous" would degenerate from a rule of law to an empty formula recited at the end of de novo appellate decisions.

3. Respondents suggest that the principle of res judicata was applicable to the

Baxter plaintiffs because the district court's decision on the class claims actually resolved on the merits the individual claims of Baxter, et al.:

> The District Court's Memorandum of Decision concluded that the Bank had discriminated ... only in promotions out of Grades 4 and 5, but not in other respects. 1/

Elsewhere the Bank repeatedly but more subtly implies that the individual claims were actually considered and decided, referring for example to "the class action judgment ... adverse to" the Baxter plaintiffs (Bank Brief, p. 7; see also id. at 3, 6, 9). The actual language of that portion of the district court's opinion dealing with promotions out of the grades in which the Baxter plaintiffs were found, however, reads:

1/ Respondent's Brief in Opposition to Petition (hereinafter cited as "Bank Brief") (Emphasis added), p.1; see also Memorandum for the Federal Respondent (hereinafter cited as "U.S. Brief"), p. 1 n. ("the finding of no discrimination against the group to which they belong").

> There does not appear to be a pattern and practice pervasive enough for the court to order relief. 194a.

This passage holds only that such discrimination was not sufficiently widespread to justify a class-wide remedy. Far from concluding that no class member had ever been the victim of discrimination, the clear import of the opinion is to the contrary.

The Bank further asserts that the Baxter plaintiffs have had "their day in court." (Bank Brief, p. 3). When that day supposedly was the Bank does not say. It certainly was not in mid-September, 1980, when the Bank successfully prevented the Baxter plaintiffs from even testifying at the Cooper trial about their individual claims. Nor was it January, 11, 1983, when the Fourth Circuit held, at the Bank's behest, that there was never to be a trial in Baxter itself. Never in the history of this dispute, despite repeated efforts to do so, have Phyllis Baxter, Brenda Gilliam, Glenda Knott and

Sherri McCorkle been permitted to take the stand and describe to a federal judge the alleged violation of their rights. The principles of res judicata cannot conceivably apply to claims that were neither adjudicated nor even heard.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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